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NO.

In The

Supreme Court of the United States

OCTOBER TERM, 1982

CARMEN E. PAVONE, SR., CARMEN E. PAVONE, JR., and PAVONE, INC.
Petitioners,

VS.

Louis O. Giuffrida,
~~JOHN W. MACY,~~ DIRECTOR
FEDERAL EMERGENCY MANAGEMENT AGENCY
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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August 20, 1982

QUESTION PRESENTED

Whether the Federal Emergency Management Agency (FEMA) should be equitably estopped from denying payment to an insured under a flood insurance contract when a partial payment has already been made by FEMA under the same contract based upon a proof of loss which was not submitted in compliance with the terms of that contract, and both parties continued thereafter to negotiate the loss.

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The Petitioners, Carmen E. Pavone, Sr., Carmen E. Pavone, Jr., and Pavone, Inc., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on May 24, 1982.

Opinions Below

The opinion of the Court of the Appeals for the Second Circuit is unreported. The decision of that Court is printed as Appendix A hereto.

The opinion of the United States District Court for the District of Connecticut is unreported. The Memorandum of Decision of that Court is printed as Appendix B hereto.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was made and entered on May 24, 1982 and this petition for certiorari is being filed within 90 days of that date. The jurisdiction of the United States Supreme Court is being invoked under 28 U.S.C. §1254(1).

STATEMENT OF CASE

The Petitioners, Carmen E. Pavone, Sr. and Carmen E. Pavone, Jr. are the owners of certain property located at 2428 Main Street, Stratford, Connecticut. They are also the sole stockholders of a Connecticut corporation known as Pavone, Inc., which operates a restaurant business at that premises.

In December, 1978, the Petitioner, Pavone, Inc. purchased and thereafter maintained in full force a flood insurance policy on the premises. The policy was issued by the predecessor of the Federal Emergency Management Agency (FEMA) under the National Flood Insurance Program (NFIP). The policy provided coverage for all direct loss by flood, including structural damage and content loss.

On January 21, 1979 the property of the Petitioners both real and personal was damaged by severe flooding conditions. On the same day Carmen E. Pavone, Jr. notified his insurance agent of the damage and a notice of loss was filed soon thereafter.

On January 23, 1979, an adjuster from General Adjustment Bureau (GAB) inspected the premises relative to the loss. GAB had been requested and assigned by FEMA to inspect and adjust the flood insurance claim of Pavone, Inc.

During the months of February and March, 1979, the Pavones obtained structural engineering reports to substantiate the structural damage to the building. These were submitted to the adjuster for FEMA within 60 days after the date of loss. Since there was no cellar other than a crawl space under the floor, it was somewhat difficult for anyone to visually inspect the damage to the foundation.

Several on-site meetings were held during the months of February and March, 1979, at the request of FEMA's adjuster so that he could investigate and inspect the loss. In fact, FEMA obtained its own independent structural engineering report to determine the damage to the building. The Petitioners also submitted to FEMA's adjuster a list of all personal property and contents which were damaged by the flood.

On March 14, 1979, within 60 days after the date of loss an on-site meeting was held between the Pavones, Richard Kelly of GAB, adjuster for FEMA, and the structural engineers (one having been hired by FEMA). Also present at the meeting was Attorney John G. Betar, Jr., representing the Pavones. All parties agreed at that meeting that further cost estimates would be required relative to the structural damage and that therefore the contents loss and the structural loss would be adjusted separately. (The flood policy provided for content coverage in the amount of $20,000 and structural damage coverage in the amount of $80,000). It was further agreed at this meeting that the Pavones were to submit additional contractor's estimates for the repair of the building structure.

After that meeting an agreed upon figure was reached relative to the contents loss. FEMA prepared and sent a document entitled "Proof of Loss" marked "Contents Only" for Plaintiffs' signature. This partial proof of loss covering the contents

damage was sent by FEMA's adjuster on April 4, 1979, executed by the Pavones and returned on April 5, 1979 to FEMA. On April 19, 1979 FEMA issued a check under the flood policy to pay for the contents portion of the loss based upon this Proof of Loss which was submitted some 74 days after the date of loss.

In accordance with the agreement reached at the meeting of March 14, 1979, the Pavones thereafter obtained additional contractor estimates and submitted them to the adjuster for FEMA. After review of these estimates the adjuster requested additional on-site inspections which were held in July, 1979. Negotiations and inspections were on-going between the parties from the date of loss through July, 1979. Thereafter FEMA's adjuster issued a letter dated July 23, 1979 to the Pavones' attorney stating "We are willing to accept a Proof of Loss in the net amount of $11,300.15...." for the structural damage to the building.

The offer was not acceptable to the Pavones since all the estimates which they had obtained were much higher. Since the parties were unable to negotiate a settlement for the loss the Pavones instituted an action against FEMA.

It should be noted that the crux of the dispute between the parties had nothing to do with the filing of Proof of Loss forms but rather the fact that FEMA's determination that the amount of the loss was not the result of the flood but the result of the previous deteriorated condition of the building structure.

In FEMA's answer and special defense it raises for the first time a question as to the Pavones' compliance with the contract language requiring that they file a Proof of Loss within 60 days after the date of loss. FEMA then filed a Motion for Summary Judgment alleging several defects and violations by the Pavones under the terms of the contract. On September 3, 1981, U.S. Magistrate Thomas P. Smith denied FEMA's motion for Summary Judgment and FEMA then filed an objection to that decision and reiterated its claim that Pavones' failure to file a "proof of loss" was a bar to this action.

On January 7, 1982, Ellen Bree Burns, United States District Judge granted the FEMA's Motion for Summary Judgment, and the Court of Appeals for the Second Circuit affirmed that decision on May 24, 1982.

JURISDICTION OF THE DISTRICT COURT

The District Court had jurisdiction over the pending action by virtue of 42 U.S.C. §4072.

REASONS FOR GRANTING THIS WRIT

Certiorari should be granted in this case because the Court of Appeals for the Second Circuit has rendered a decision in conflict with the decisions of other Courts of Appeal on the same issue.

The Seventh Circuit has ruled, in a case which is factually identical with the Petitioners', that a government agency will not be permitted belatedly to assert a technical defense to a law suit, and that under limited factual circumstances the Government may be equitably estopped.

In *Meister Bros. Inc.* v. *John W. Macy, Jr.* Director of Federal Emergency Management Agency, No. 81-1795 (7th Cir., C.D. Ill., March 29, 1982) the General Adjustment Bureau was again hired by FEMA to investigate and adjust a flood loss. GAB made several on-site inspections investigating the loss and after the deadline for filing the proof of loss form had passed, the adjuster prepared for the insured's signature a proof of loss for the contents portion of the loss. FEMA paid on the loss for the contents and GAB continued to investigate and negotiate the damage to the building, however no settlement was reached and suit was instituted.

The Court in the Seventh Circuit held that "Given these facts, we find that the conduct of the Agency and its agents were sufficient to estop the government from asserting the untimely filing as a defense in any manner." IBID

The question of estoppel against the government has been deemed appropriate in several Circuits under certain circumstances. *United States* v. *Fox Lake State Bank* 366 F2962 (7th Circuit 1966); *United States* v. *Lazy F.C. Ranch,* 481 F2d985 (9th Circuit, 1973): *Brandt* v. *Hickel* 427 F253 (9th Circuit 1970); *Ann Hansen* v. *Patricia Roberts Harris, Secretary of H.E.W.* 619 F2942 (2nd Circuit, 1980); *Corniel-Rodriguez* v. *INS* 532 F2d301 (2nd Circuit 1976).

However, neither the circuit courts nor the Supreme Court have set forth what type of conduct will estop the Government, except that the principles of estoppel will be applied with circumspection to the conduct of government operations.

In its recent decision *Schweiker, Secretary of Health and Human Services* v. *Hansen* 450 U.S. 785 (1981) the Court recognized that it "has never decided what type of conduct by a Government from insisting upon compliance with valid regulations governing the distribution of welfare benefits." Nor has the Court decided what type of conduct would invoke the principles of estoppel when the Government enters into contractual relationships with its citizens.

The Court has relied upon the language in *Federal Crop Insurance Corp.* v. *Merrill* 332 U.S. 380 (1947) at 385 where the Court said "(it is) the duty of all Courts to observe the conditions defined by Congress for the charging the public treasury."

Unlike Merrill the instant case deals with a valid contract between the Government and its citizens which was in full force and effect at the time of the loss. Further, the Government continued to deal with the Petitioners to negotiate their loss, and not until litigation was instituted did it raise the technical defense of an untimely filed proof of loss.

The Court should clarify the factual distinctions which affect the question of when the Government may be estopped. The lower courts are still inconsistent with their rulings even when the exact factual situation exists.

The issue of Governmental estoppel raises important economic questions especially for the Petitioners. Unlike Hansen, the Petitioners are forever barred from recovery of their loss if the lower Court decision is allowed to stand. The Petitioners were entitled to coverage under a valid insurance contract with FEMA and would have recovered under these factual circumstances had the insured been a private insurance carrier.

This is not a situation where the Court must protect the public treasury. The Petitioners sustained a valid loss under a policy issued by the Government, and for which the Petitioners had paid to the Government premiums. After the loss the insured dealt in good faith with the Government in negotiating the loss until an impasse was reached regarding their structural loss. The facts are clear that the Petitioners cooperated and supplied everything requested by the government even after the 60 days expired.

The Government is not acting in its sovereign capacity when dealing with its private citizens in issuing flood insurance policies. The Government is effectively engaged in private business and should be subject to the rules of equity and fair play.

CONCLUSION

The petition for certiorari should be granted. The Supreme Court should review this case because the Court of Appeals are in conflict on the question of estoppel against the government and under what circumstances the principles of estoppel will be applied. This issue is one of substantial public importance under federal case law and the time is ripe for the Supreme Court to settle this question.

RESPECTFULLY SUBMITTED

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